What's Sex Got To Do with It?

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Plaintiffs in Title VII hostile work environment cases must prove that the sexually oriented misconduct they suffered was both pervasive and unwelcome. In this note, Miranda Oshige argues that these requirements conflict with the language and purpose of Title VII because they insulate from liability some discrimination against women in the workplace. Ms. Oshige proposes that the hostile work environment violation be conceived as simply a form of gender-based disparate treatment, rather than as "sexual" harassment. Accordingly, she argues, welcomeness should be reconfigured as an affirmative defense, and pervasiveness considered only when measuring damages, not as an element of the claim. Thus conceived, Ms. Oshige contends, hostile work environment doctrine would more faithfully reflect Congress' mandate to achieve equality in the workplace regardless of gender.

Charles Hardy treated Teresa Harris differently than the men who worked for him. He dropped things on the floor and asked her to pick them up.[1] He suggested she go with him to the local Holiday Inn to negotiate her raise.[2] He asked her to retrieve coins from the front pocket of his pants.[3] He called her a "dumb ass woman."[4] He told her in front of other workers that she must have promised a customer sex to get him to sign a deal with the company.[5] Harris sued him under Title VII, claiming that Hardy's actions discriminated against her by creating a hostile work environment.[6] Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating "against any individual with respect to . . . compensation, terms, conditions or, privileges of employment, because of such individual's . . . sex."[7] Although the language of Title VII plainly seems to condemn boorish behavior like Hardy's, Harris lost her case in both the district and circuit courts.[8] While the Supreme Court reversed the circuit court's decision, it did so on a narrow ground that fails to clarify the doctrinal confusion that caused Harris to lose her case in the lower courts.

Congress originally enacted Title VII of the Civil Rights Act of 1964 to prohibit discrimination in the workplace on the basis of race, color, religion, or

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1. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. 42 U.S.C. § 2000e-2(a)(1) (1988).
8. *Harris,* 114 S. Ct. at 369-70.

national origin.[9] The prohibition against discrimination on the basis of sex was added to Title VII only as a last-minute amendment.[10] As a result, judges have little to guide them in the attempt to define the contours of sex discrimination in the workplace. At the very least, the language of the statute suggests that Title VII should guarantee women an equal working environment. That guarantee, however, has gone unfulfilled, particularly with respect to working women who are subjected to abusive conduct at their place of employment.

In this note I examine the inadequate judicial treatment of sex discrimination claims. In particular, I focus on the hostile work environment doctrine and analyze its application by the courts. Currently, in order to win a Title VII hostile work environment claim, an employee must prove that: (1) her employer subjected her to abusive conduct of a sexual nature, (2) she did not welcome it, (3) the conduct was both severe and pervasive enough that it unreasonably altered her working conditions, and (4) that it would have done so for a reasonable person in her situation.[11] Because the burden of establishing these facts rests with the plaintiff, women subject to discriminatory workplace conduct often find that they must endure degrading and humiliating inquiries about their sexual histories, as defendants attempt to cast them as unworthy of protection by Title VII. Under the perverse structure of current law, a female employee who brings criminal rape charges against her supervisor is protected from such inquiries in a criminal trial. But a woman who brings a civil suit for a hostile work environment against her supervisor based on the same conduct may expect every aspect of her life—from past boyfriends to her dress to her sense of humor—to be fair game for discovery and manipulation before a trier of fact.[12]

A close analysis of the hostile work environment doctrine and its development reveals a judicial assumption that society generally desires, and therefore that courts should tolerate, flirtation and other sexually based interactions, even in the workplace. Thus, courts have developed a standard for hostile work environment claims that require proof of "unwelcome" and severe or pervasive sexual harassment, presumably to protect "normal" and "desirable" sexual behavior at work. I argue that this fear of penalizing (and thus chilling) "normal" behavior in the workplace pollutes the hostile work environment doctrine and undermines the role of women in the workplace.

Framing the hostile work environment cause of action in terms of "sexual" harassment creates unnecessary hurdles for plaintiffs alleging discrimination. First, the current case law unnecessarily burdens plaintiffs by requiring them to prove that they did not welcome the discriminatory conduct. Moreover, under current doctrine, a woman can state a claim only if she has suffered outrageous conduct that courts deem beyond the boundaries of normal courting. Because courts require plaintiffs to establish the severity and pervasiveness of the objec-

9. H.R. REP. NO. 914, 88th Cong., 2d Sess. 2 (1964).

10. 110 CONG. REC. 2577 (1964).

11. *Harris,* 114 S. Ct. at 370; Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-68 (1986).

12. *See* note 86 *infra;* text accompanying notes 86-88 *infra.*

tionable conduct, implicitly they condone a certain level of discriminatory conduct in the workplace.

To eliminate the substantial problems caused by these deficiencies, I propose that the hostile work environment cause of action be reconfigured simply as *gender-based disparate treatment.* Under such a configuration, Title VII liability would depend upon: (1) whether the employer subjected the plaintiff to disparate treatment; (2) whether the disparate treatment would not have occurred if the plaintiff had been a man—that is, because of the plaintiff's gender; and (3) whether the disparate treatment reflected invidious stereotypes about women.[13] In determining whether a plaintiff welcomed the conduct at issue, courts should strictly limit their inquiry to whether the plaintiff actually initiated the conduct. Welcomeness should also be reconfigured as an affirmative defense, and defendants should bear this burden. Further, stricter evidentiary rules should govern the admission of evidence as to whether the plaintiff welcomed the discriminatory behavior. Finally, the question of the pervasiveness of the hostile work environment should only arise in connection with damages, not in the liability phase of the trial.[14] As a result, an employer who argues that his discriminatory conduct was not severe enough to amount to "real" harassment will not escape liability for discrimination. On the other hand, employers will only be liable for the damages they cause: Employers causing little harm will pay little, but employers causing substantial harm will pay more substantial damages.

I. *HARRIS*, *MERITOR*, AND THE LIMITS OF THE HOSTILE WORK ENVIRONMENT CAUSE OF ACTION

During oral argument before the Supreme Court in *Harris*, some of the justices posed a fundamental question for Title VII sexual harassment claims: Why was there any real argument over what should have been an obvious violation of Title VII under a hostile work environment theory?[15] More specifically, as Justice Ginsburg inquired during oral argument and in her concurrence, why is it not enough for Title VII purposes that Hardy's misconduct forced Harris to endure different working conditions because she is a wo-

13. This formulation borrows from 14th Amendment gender equal protection jurisprudence, which in evaluating whether disparate treatment constitutes invidious discrimination looks to whether the discrimination reflects "archaic and stereotypic" generalizations about women. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (holding that a university's refusal to admit men into its nursing school violates the 14th Amendment because it perpetuates the stereotype that nursing is exclusively a woman's job).

14. Such an approach would parallel the mixed-motive cause of action. In a mixed-motive case, if a defendant employer considered race, gender, or other impermissible factors in its decision to hire, fire, or not promote an employee, it is liable under Title VII. Liability attaches even if the employer had independent, nondiscriminatory reasons for its decision. 42 U.S.C. § 2000e-2(m) (Supp. V 1993). That the employer would have made the same decision regardless of discriminatory motive only mitigates damages. *See id.* § 2000e-5(g)(2)(B) (stating that in such a case a court may grant attorneys' fees and costs or declaratory or injunctive relief). An employer in a hostile work environment case, reconfigured as I propose as a gender-based disparate treatment case, similarly would not be able to escape liability for its discrimination by arguing that the discrimination was minimal. The degree of discrimination, as in mixed-motive cases, would be relevant only to assess damages and not to determine liability.

15. Lyle Denniston, *Ginsburg: Not a Tentative Beginner,* AM. LAW., Dec. 1993, at 84, 84-85.

man?[16] Unfortunately, the *Harris* Court did not confront the challenge Justice Ginsburg's question posed. Instead, the Court analyzed Harris' case as a hostile work environment claim and held that Harris lost in the trial and appellate courts simply because the lower courts had simply misinterpreted the Supreme Court's landmark hostile work environment case, *Meritor Savings Bank v. Vinson*.[17] The Court's conclusion that the district and circuit courts had misinterpreted *Meritor* does not speak well for the clarity of the rule set forth in that case. More importantly, any legal standard that could lead the district and circuit courts to characterize *Harris* as a "close case"[18] cannot offer a plausible interpretation of Title VII.

According to the Court, the Sixth Circuit erred in requiring Harris to prove that the defendant's conduct had inflicted tangible psychological injury.[19] The Court overturned that requirement, holding that "[w]hen the workplace is permeated with 'discriminatory intimidation ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated."[20] This standard, which incorporates the language of *Meritor* that led the Sixth Circuit to impose a "tangible psychological injury" test in the first place, seems unlikely to provide any real guidance to courts faced with hostile work environment claims.

Perhaps aware that such a vague standard would provide little guidance to lower courts, the Court discussed some factors to be considered in determining whether an employer's conduct had crossed the line from being merely offensive to creating a hostile or abusive work environment. Lower courts must examine "all the circumstances"[21] and evaluate the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[22]

The Court's opinion implies two further holdings of paramount importance to Title VII hostile work environment claims. First, the Court reiterated *Meritor*'s conclusion that the " 'mere utterance of an . . . epithet [that] engenders offensive feelings in a[n] employee,' does not sufficiently affect the conditions of employment to implicate Title VII."[23] By minimizing such behavior, the

16. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring).

17. *Id.* at 371. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), held that sex discrimination under Title VII is not limited to tangible economic injury and that employees are entitled to a work environment free of "discriminatory intimidation, ridicule, and insult." *Id.* at 65.

18. *Harris*, 114 S. Ct. at 369.

19. *Id.* at 370.

20. *Id.* (quoting *Meritor*, 477 U.S. at 65, 67) (footnotes omitted).

21. *Id.* at 371.

22. *Id.*.

23. *Id.* at 370 (quoting *Meritor*, 477 U.S. at 67) (footnote omitted). In *Meritor*, the Court noted in dicta for the first time that a single epithet could not alone violate Title VII. 477 U.S. at 67. *Meritor* relied on Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The 5th Circuit in *Rogers* was the first to recognize that race-based comments in the workplace could form the basis of a cause of action under Title VII if they created a working environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." 454 F.2d at 238. Interestingly, although *Meritor* and *Harris* quote *Rogers* with approval in

Court creates a safe harbor for discrimination: Calling a woman one offensive gender-based name does not amount to cognizable disparate treatment in the workplace. Second, and more generally, under *Harris* an employer does not violate Title VII even if the employer treats female employees differently than male employees. Some disparate treatment—that is, some discrimination—is permissible in the workplace so long as the employer's discriminatory conduct does not *unreasonably* interfere with the employee's ability to do her work. What the Court means by "unreasonably" is not entirely clear; one can only wonder what "reasonable" interference with a woman's work would look like.

Title VII's language certainly does not compel either of these requirements; to the contrary, a persuasive argument may be made that the requirements are fundamentally at odds with both Title VII's language and its purpose. Title VII sets a standard that would prohibit behavior far less egregious than what the courts presently require to establish a hostile work environment claim. In order to make the doctrine consistent with the statute, a plaintiff should only have to prove that the employer's conduct, in Justice Ginsburg's words, makes "it more difficult [for the plaintiff] to do the job."[24] In light of Title VII's plain language, the Court has an uphill battle in justifying why it would require plaintiffs to show pervasiveness and unreasonable interference with their ability to do work in order to state a hostile work environment claim. The Court did not offer any justification in either *Meritor* or *Harris*. These requirements appeared *ipse dixit*, with little discussion and nothing that approaches a persuasive justification.

Analytically, Justice Ginsburg's concurrence breaks further with the majority in *Harris* than her conciliatory language suggests. She does not just argue that a plaintiff should only have to show that her employer's conduct made it more difficult for her to do her job. Her concurrence reflects a more basic disagreement with the *Harris* majority's understanding of hostile work environment. As she put it, "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[25]

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dicta, *Harris*, 114 S. Ct. at 371, *Meritor*, 477 U.S. at 67, *Harris* struck down the 6th Circuit's application of a hostile work environment standard similar to the standard applied in *Rogers*. The Court rejected the standard set out in Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), requiring that a plaintiff show that her employer's discriminatory behavior was so severe as to affect seriously her psychological well-being in favor of a standard that required a lesser showing of abusiveness. *Harris*, 114 S. Ct. at 370.

24. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)) (internal quotation marks omitted).

25. *Id.* Justice Ginsburg claimed to be in agreement with the majority's opinion and approach to hostile work environment claims. "The Court's opinion . . . seems to me in harmony with the view expressed in this concurring statement." *Id.* at 373. Yet it appears that Justice Ginsburg's formulation diverges from the majority opinion significantly. The majority requires a much higher showing of interference with the plaintiff's ability to work than Justice Ginsburg would. She agrees with the Court's standard of "unreasonable interference" but implicitly defines "unreasonable interference" as conditions that simply make it more difficult for the plaintiff to do her job than it is for men in the office. *Compare id.* at 370 (explaining the majority's standard) *with id.* at 372 (explaining Justice Ginsburg's proposed standard).

The standard I propose in this note tracks Justice Ginsburg's stance and suggests doctrinal reforms to implement it: If a supervisor treats his female subordinates differently than he treats his male subordinates because of their gender, and that disparate treatment reflects invidious stereotypes about women, then such disparate treatment *alone* should be enough to establish liability under Title VII. I draw a distinction here quite consciously between the treatment of female subordinates by their supervisors and the treatment of female workers by coworkers, and the standard I propose should only be read to apply to behavior in the former case. Because supervisors generally have the power to hire, fire, promote, or, at the very least, evaluate a subordinate's work so that others may make these decisions, supervisors have much more power over subordinates than coworkers have over one another. Thus, "[t]he position [of] power of the supervisor . . . may operate as an enabling force in sexual harassment."[26] Even if a supervisor does not intend to take advantage of his position of power over a subordinate, "the employee may perceive and respond to the authority inherent in the position."[27] In comparison to those of a coworker, a supervisor's actions toward subordinates will more likely affect the terms and conditions of a woman's employment.

As I elaborate further in Part II, in interpreting Title VII courts have tacitly assumed that flirtation and sex are natural behaviors worthy of protection in the workplace. This assumption lies at the root of judicial reluctance to find Title VII violations in nonpervasive instances of workplace harassment and is reflected in the courts' characterization of the hostile work environment as "*sexual* harassment" rather than "disparate treatment based on gender." Thus, courts have developed a standard that requires proof of severe or pervasive sexual behavior in the workplace to ensure that the law does not sanction "normal" and "desirable" sexual behavior. The courts' fear of penalizing or chilling "normal" behavior in the workplace distorts the entire hostile work environment doctrine, even though much of the disparate treatment in the workplace bears no resemblance to mutual flirting or consensual sexual behavior of any kind.

II. THE PROBLEMS WITH TREATING GENDER HARASSMENT CLAIMS AS SOMETHING DIFFERENT FROM DISPARATE TREATMENT

A. *Current Doctrine Unjustifiably Distinguishes Between Discrimination Based on Sexual Conduct and Discrimination Based on Nonsexual Conduct*

In order to establish a successful Title VII hostile work environment claim based on gender, a plaintiff must meet a heavier burden than plaintiffs who allege other kinds of Title VII discrimination. A hostile work environment plaintiff must demonstrate that: (1) her employer subjected her to conduct of a sexual nature, (2) that she did not welcome this conduct, (3) that the conduct

26. Jeanette N. Cleveland & Melinda E. Kerst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, 42 J. VOCATIONAL BEHAV. 49, 54 (1993) (footnote omitted).

27. *Id.* at 55.

was severe or pervasive enough to create a work environment that was objectively hostile or abusive, and (4) that subjectively it did alter her work environment.[28] While the concept of a hostile work environment cause of action originated in racial discrimination cases,[29] in the gender discrimination context the hostile work environment cause of action evolved from the quid pro quo sexual harassment cause of action. That lineage is responsible for some confusion in the doctrine. In cases of quid pro quo harassment, an employer implicitly or explicitly demands sexual favors from an employee as a condition of her continued employment, her hiring, or her promotion.[30] In the late 1970s and early 1980s, many courts began to realize that quid pro quo harassment represented only one kind of discrimination women regularly endured in the workplace.

Much of the discriminatory treatment women suffer does not implicitly or explicitly extort sexual favors for continuing employment or advancement. Rather, much discriminatory treatment involves conduct that constitutes gender-based disparate treatment. An employer or supervisor might, for example, flirt with a woman, ask her out on dates, grope her, or call her gender-based names—a whole range of behavior that belittles, undermines, or objectifies a woman without formally putting her job on the line. This treatment creates employment conditions different from those a woman's male coworkers face.

The Equal Employment Opportunity Commission (EEOC) recognized this unequal state of affairs in the early 1980s and established guidelines defining hostile work environment sexual harassment as a form of sex discrimination prohibited under Title VII.[31] The EEOC guidelines define prohibited sexual

28. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-69 (1986); Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982); *cf.* Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991) (establishing a "reasonable victim" standard for determining whether the conduct at issue created an abusive environment). In contrast, a plaintiff alleging racial or gender discrimination in hiring or firing decisions initially faces a light prima facie burden of proof as established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In such a case a plaintiff need only prove that (1) she belongs to a protected class; (2) she applied for and was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications she was rejected; and (4) that after her rejection the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications. *Id.* at 802. Winning a case under *McDonnell Douglas* is admittedly more difficult than stating a prima facie case, however. If the defendant rebuts the plaintiff's prima facie case with evidence of reasons other than discrimination for the plaintiff's rejection, plaintiff must show that the legitimate nondiscriminatory reasons the employer offered to justify not hiring the plaintiff were mere pretexts for invidious discrimination. *Id.* at 804. Nevertheless, in a *McDonnell Douglas*-style case, the Court has clearly defined the prohibited conduct—discrimination. Unlike the law covering hostile work environment claims, *McDonnell Douglas* does not require proof of severity or pervasiveness of the discrimination. Thus, a court need not engage in an amorphous search for evidence of those "elements."

29. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972) (reasoning that Congress' broad mandate to eliminate ethnic and racial discrimination encompasses protection against a discriminatory work environment).

30. *See Meritor,* 477 U.S. at 62 (noting that EEOC guidelines prohibit sexual harassment, including conduct that conditions employment benefits on sexual favors).

31. A cause of action for discrimination based on a hostile work environment has its roots in *Rogers.* In that case, a circuit court recognized for the first time that a workplace "heavily charged with ethnic or racial discrimination" could in and of itself violate Title VII by creating a hostile work environment. *Rogers,* 454 F.2d at 238. Yet the early EEOC guidelines for hostile work environment based on gender were much narrower than the cause of action established in *Rogers* for racial harassment

harassment as "[u]nwelcome *sexual* advances, requests for *sexual* favors, and other verbal or physical conduct of a *sexual* nature . . . [that] ha[ve] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[32] In many ways the EEOC guidelines expanded women's bases for claims of employment discrimination because they recognized that an employer does not have to threaten a woman's employment directly for her to have been discriminated against in the terms and conditions of her employment.

Why the EEOC guidelines emphasize the *sexual* nature of the conduct is not entirely clear. Perhaps the EEOC simply thought that in the gender discrimination context the hostile work environment claim was merely an extension of the quid pro quo cause of action rather than a distinct cause of action in its own right. That the EEOC addressed the elements of both the quid pro quo and the hostile work environment causes of actions in the same set of guidelines buttresses this interpretation.[33] Although the EEOC guidelines expand the relief available to women for disparate treatment on the job, they do not fully address the problem of gender-based disparate treatment in the workplace.

B. *Neither the Language of Title VII nor Empirical Research Supports a Distinction Between Sexual and Nonsexual Conduct*

By defining the hostile work environment cause of action in terms of sexual conduct rather than in terms of gender-based disparate treatment,[34] the courts and the EEOC have established an interpretation of Title VII at odds with its language. This interpretation holds that some amount of sexual conduct at work between supervisors and their employees is perfectly acceptable. Courts are reluctant to recognize a woman's claim of sexual harassment as discrimination unless the conduct is of the kind that would be inappropriate *outside* of the workplace. As Judge Posner puts it, the proper definition of sexual harassment "exclude[s] mere flirtations and solicitations."[35] Judge MacKinnon echoed this view: "Sexual advances [in the workplace] may not be intrinsically offensive .

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because they emphasize the *sexual* nature of the conduct. In addition, the EEOC guidelines for gender-based discrimination are narrower in that they require a plaintiff to show that the conduct in question was unwelcome.

32. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1994) (emphasis added).

33. *See id.*

34. Indeed, the new proposed EEOC guidelines on nonsexual, gender-based harassment explicitly distinguish between nonsexual and sexual conduct. Only plaintiffs who allege a hostile work environment based on gender-based conduct of a sexual nature must prove that such discriminatory conduct was unwelcome. Unwelcomeness is presumed for nonsexual gender harassment. As the EEOC put it, "Sexual harassment continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment . . . ." Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 51,267 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993) [hereinafter Guidelines on Harassment].

35. Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws,* 56 U. CHI. L. REV. 1311, 1331 (1989).

. . . [for they involve] social patterns that to some extent are normal and expectable."[36]

The assumption that some level of flirtation or dating behavior is acceptable or desirable at work seems to command broad support.[37] But the empirical research performed to date indicates that even "mere flirtations" can demean a woman and interfere with her ability to work. Flirtatious behavior and sexual "compliments" about a woman's appearance have been shown to cause "sex role spillover," a term used to describe the process by which attitudes and expectations regarding women's behavior outside the workplace are transferred into the workplace.[38] "Sex role spillover" means that women are defined by reference to their traditional, circumscribed roles as helpers or sex objects, rather than as original thinkers or serious professionals.[39] Defining women at work as "women" rather than as workers circumscribes expectations of the kind of work women can do and thus discriminatorily limits their work horizons. "Mere flirtation" is no small matter for women; such acts may hinder women's ability to succeed in the workplace by perpetuating "sex role spillover" and similar forms of adverse disparate treatment of women.[40] In other words, flirtations and flirtatious compliments cast women in dual roles: as workers and as sex objects, or worse, as sex objects conveniently located at work.[41] In the latter case, a woman can be transformed from an attorney or an accountant into

36. Barnes v. Costle, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring).

37. One commentator has asserted, "[A]ttitudes toward nonharassing sexual behavior are generally favorable and . . . such behavior is prevalent at work." Sharon A. Lobel, *Sexuality At Work: Where Do We Go from Here?*, 42 J. VOCATIONAL BEHAV. 136, 142 (1993).

38. BARBARA A. GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS 15-17 (1985). According to Gutek,

> *Sex role spillover* is a term used . . . to denote the carryover into the workplace of gender-based roles that are usually irrelevant or inappropriate to work. Sex role spillover occurs, for example . . . when women are expected to serve as helpers (as in laboratory helper), assistants (as in administrative assistant), or associates (as in research associate) without ever advancing to head of the laboratory, manager of the office, or principal member of the research staff.
>
> When men are expected to behave in a stereotypical manner—to automatically assume the leader's role in a mixed-sex group, pay for a business lunch with a female colleague . . . sex role spillover also occurs.
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> . . .
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> . . . If people at work behaved within the narrow confines of work roles, [instead of within the confines of sex roles,] then sexual jokes, flirtatious behavior, sexual overtures, and sexual coercion would not exist in most workplaces.

Id.

39. *Id.*; *see also id.* at 167 ("A woman cannot be an analytical, rational leader and a sex object at the same time. When she becomes a sex object, her status as a sex object overpowers other aspects of her sex role and completely overwhelms the work role she is trying to occupy."); *id.* at 67 (arguing that "men who make serious sexual overtures toward women tend to treat women as women" rather than as serious employees); *id.* at 165 ("[W]hen an employee is complimented for physical attractiveness . . . a subtle side effect may be to draw attention away from work accomplishments.").

40. *See* Barbara A. Gutek, *Understanding Sexual Harassment At Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 350 (1992) (arguing that behavior not commonly considered sexual harassment, such as dating, quasi-sexual touching, and compliments about physical appearance, also have "negative work-related consequences for women workers, although even they are not always aware of them").

41. *Id.* at 354-55 (arguing that "women do not seem to be able to be sex objects and analytical, rational, competitive, and assertive at the same time . . . . [because the sexual aspects of the female role] swamp or overwhelm a view of women as capable, committed workers").

"smart, attractive SWF, 49."[42] The consequences of such a role are substantial. Who will promote a "SWF, 49," when they can promote a "real" attorney?

The empirical research to date supports this analysis, indicating that women dislike "mere" flirtations, sexual jokes, innuendos, and comments in the workplace, and that such conduct impedes women's ability to do their jobs.[43] Such conduct thus places women at a disadvantage relative to otherwise similarly situated men. In Barbara Gutek's survey of 1232 working adults in Los Angeles County, most respondents initially assumed that men and women felt flattered to receive sexual advances from someone at work, particularly from a propositioner. But in contrast, when asked how they themselves would feel if propositioned at work, only 17 percent of the women said they would feel flattered. Sixty-seven percent of the men, on the other hand, said they would be. Moreover, 63 percent of the women said if propositioned, they would feel insulted, while only 15 percent of the men said they would take offense.[44] The research also suggests that "mere" flirtations hinder women's ability to work effectively and consequently blocks their ability to advance in their careers.[45] Nearly 7 percent of women who responded to Gutek's survey, for example, reported losing a job at some point for refusing sexual advances, versus 2 percent of men. Women were also nine times more likely to quit a job or abandon efforts to get a job because of sexual harassment and twenty-five times more likely to seek a job transfer.[46] Women's reactions to sexual overtures, propositions, and compliments about their physical appearance at work bolster the contention that women rarely like such comments.[47]

Perhaps women "realize that being attractive to men is not their prime motive for working."[48] Indeed, women who experience this type of conduct, "including sexual comments meant to be complimentary, are less satisfied with their jobs than other women are."[49] Gutek also points out that "an emphasis on workers' gender in the workplace is generally not necessary for the effective

42. *See Personals,* N.Y. REV. BOOKS, Apr. 7, 1994, at 51.

43. Indeed, the most commonly reported sexually harassing behavior at work was of the kind not thought of as the "most serious," including requests for dates, unwanted physical contact, the use of offensive language, and sexual propositions that were not conditioned on future employment or success. *See* Paula M. Popovich, DeeAnn N. Gehlauf, Jeffrey A. Jolton, Jill M. Somers & Rhonda M. Godinho, *Perceptions of Sexual Harassment as a Function of Sex of Rater and Incident Form and Consequence,* 27 SEX ROLES 609, 611-12 (1992).

44. GUTEK, *supra* note 38, at 20, 96-97.

45. For example, a woman who has an affair at the office, especially with her supervisor, can seriously undermine her credibility and thus damage her career. *See* Gutek, *supra* note 40, at 350.

46. GUTEK, *supra* note 38, at 54. A recent University of Arizona study backs up Gutek's findings. This study found that fewer than 1% of women would be flattered if propositioned by a man at work, while 13% of men would. Furthermore, about half of the women said they would be insulted, while only 8% of men would. Asra Q. Nomani, *Work Week,* WALL ST. J., Jan. 3, 1995, at A1.

47. *Id.* at 161-62; *see also* Meg Bond, *Division 27 Sexual Harassment Survey: Definitions, Impact, and Environmental Context, in* MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 189, 191-93 (1991) (reporting that graduate students asserted that they found conduct by professors, including jokes with sexual themes, invitations for dates, sexually suggestive comments, suggestive eye contact, and hinting or joking pressure for sex, to be generally "unsupportive" of women).

48. GUTEK, *supra* note 38, at 162.

49. *Id.*

conduct of work . . . [and is in fact] probably detrimental to productivity."[50] In contrast, because sexual harassment has caused many women to quit their jobs, request transfers or reassignment,[51] the "[p]rofessionalization and desexualization of work . . . are good for business, for effective work organizations."[52]

Women may be unable to view sexual conduct at work in the same way as men may[53] because they realize that at work they are "too readily seen as potential sexual partners . . . and *too reluctantly seen as serious employees*. . . . They may be understandably concerned that when their sexuality is noticed, their work is not. When men make sexual comments, they are interpreted as insults because they draw attention away from [women's] work" performance.[54] When supervisors engage in this conduct, it can be even more damaging than that when coworkers do.[55] Both overtly threatening and "innocuous" sexual conduct at work between supervisors and subordinates decreases women's productivity[56] and their job satisfaction and imposes barriers on their ability to excel as workers.[57] If Title VII mandates, as its language states, that women are not to be subjected to adverse differential treatment at work because of their gender, it follows that sexual conduct at work, and the concomitant introduction of sex roles to the workplace, creates working conditions that discriminate against women in violation of Title VII.[58]

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50. *Id.* at 121; *see* notes 45 *supra* & 56 *infra.*

51. According to a United States Merit Systems Protection Board report, "[d]uring a recent 2-year period, over 36,000[ ] federal employees quit their jobs, were transferred or reassigned, or were fired because of sexual harassment. [And] [a]mong 88 cases filed with the California Department of Fair Employment and Housing, almost half [of the women] had been fired and another quarter had quit out of fear or frustration." Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping With Sexual Harassment,* 42 J. VOCATIONAL BEHAV. 28, 31 (1993) (citations omitted).

52. GUTEK, *supra* note 38, at 128.

53. I say "may" here because although Gutek's study tends to show that men are less threatened by sexual comments at work than women are, she focuses mainly on women's reactions to sexual conduct at work. *Id.* at 96-97.

54. *Id.* at 100-01 (emphasis added).

55. Gutek, *supra* note 40, at 341 ("The relationship between the two people is also important. The situation is . . . more serious . . . when the initiator is a supervisor of the recipient rather than an equal or a subordinate . . . .").

56. While a woman may not become less diligent at her job because of harassment, her productivity may nonetheless suffer because "lack of access to information and support from others in the work environment may well have an indirect effect on her work performance." Gutek & Koss, *supra* note 51, at 32. The federal government has estimated that sexual harassment alone cost the federal government $267 million over a two-year period in lost productivity. This figure includes the cost of replacing employees who left their jobs, sick leave for missed work, and lower group and individual productivity. This figure excludes any personal costs to the victims. U.S. MERIT SYSTEM PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 39 (1988) [hereinafter SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT].

57. Courts are not necessarily blind to this fact. The 4th Circuit noted relatively early in the development of sexual harassment doctrine that "[s]exual harassment erects barriers to participation in the work force of the sort Congress intended to sweep away by the enactment of Title VII." Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983).

58. The problem with supervisors initiating dating relationships with their subordinates or making comments about a woman worker's physical appearance is that a woman who may not have chosen to introduce her sex role into the workplace may have it foisted upon her anyway:

> What is doubly troublesome about this inability to be sexual and a worker at the same time is that women are not the ones who usually choose between the two. . . . More often . . . [a]

Finally, courts' implicit assumption—which *Harris* did not dispute—that a certain amount of flirting and sexual attention at work is acceptable reflects the apparent acceptance of the view that women do not object to being cast as sex objects at work, and the concomitant view that being cast as a sex object does not materially alter a woman's work environment. According to this view, "[b]eing attractive to men is extremely important to women, and overtures and advances are an indication of that attractiveness."[59] Unfortunately, being recognized at work as sexually attractive is at best double-edged. Not only does it make most women feel uncomfortable, it also diverts attention away from a woman's ability to perform her job and thus reinforces and reflects the misconception that women are less competent workers.[60] Because women must prove serious sexual misconduct at work before they can state a cognizable claim under Title VII, they have little ability to control the introduction of harmful sexual stereotyping into their work environment. So long as women are forced to battle the imposition of traditional, subservient sex roles at work, women will continue to face discriminatory barriers at work in violation of any plausible interpretation of Title VII.[61] Until the courts recognize that sexual conduct at work is just a subset of disparate treatment, myths about the appropriateness of sexual conduct in the workplace will persist, and only plaintiffs who have endured truly disabling, as opposed to simply discriminatory, misconduct in the workplace will be able to seek redress for the discrimination they have endured.

III. Doctrinal Effects of Framing Gender-Based Disparate Treatment in the Workplace in Sexual Terms

As currently understood, the hostile work environment cause of action reflects society's misplaced tolerance for sexual conduct in the workplace, resulting in a doctrine that excuses a great deal of gender-based disparate treatment. The notion that some sexual conduct in the workplace between supervisors and their subordinates is acceptable affects the doctrine in two fundamental ways: First, courts require a plaintiff to prove that the conduct she experienced was "unwelcome," a requirement I argue is gratuitous in theory and vicious in practice. Second, courts require a plaintiff to demonstrate that the conduct to which she was subjected was pervasive or severe enough to create an *abusive* working environment. I argue that this requirement creates a perverse safety zone in which women may be subjected to gender-based discriminatory treatment for which Title VII offers no remedy.

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working woman chooses not to be a sex object but [is] so defined by male colleagues or supervisors anyway, regardless of her own actions.

Gutek, *supra* note 40, at 355.

59. Gutek, *supra* note 38, at 97.

60. *See id.*

61. Because of women's tenuous position in the workforce, they often feel as though they have no choice but to go along with the sex role to maintain the worker role. " 'I'll never get a good recommendation from him . . . if I don't go along with him.' " Paludi & Barickman, *supra* note 47, at 30 (listing "common reactions to being sexually harassed" as reported by victims); *see also* Alba Conte, Sexual Harassment in the Workplace: Law and Practice 5 (1990) ("Sexual harassment degrades women by reinforcing their historically subservient role in the workplace.").

A. *The Unwelcomeness Requirement: An Unjust Element of the Hostile Work Environment Cause of Action*

The Supreme Court has referred to "unwelcomeness" as the "gravamen of any sexual harassment claim."[62] That characterization presents a serious problem. The unwelcomeness requirement is gratuitous, punitive, and reflects some of society's most insidious and outdated stereotypes about women and sexual behavior.[63] Not only is the unwelcomeness requirement theoretically irrelevant to whether a woman is subject to a different work environment because of her gender, in practice it also forces a woman to prove both that she "did not solicit or incite" her supervisor's conduct, and that she "regarded the conduct as undesirable or offensive."[64] The kind of evidence the Court has held as admissible to rebut the plaintiff's assertion of "unwelcomeness" is every feminist's nightmare: The Court has concluded that evidence of the sexual provocativeness of a plaintiff's "speech or dress" is "obviously relevant" to the merits of a plaintiff's claim of discrimination.[65]

In this Part I show that the unwelcomeness requirement imposes an unnecessary and unreasonable burden on women bringing Title VII claims. This burden is based on the nonsensical assumption that a woman might welcome any conduct that would be offensive enough to interfere "unreasonably" with her work. Despite the inherent flaw in such a contention, courts have adopted the unwelcomeness requirement because they continue to assume that some sexual conduct is desirable at work, and thus the doctrine must distinguish between "proper" and "improper" sexual advances.[66] But Title VII is a civil rights statute designed to guarantee women's *equality*, not to guarantee that sexual advances will be made courteously. If we recognize and reconceptualize sexual harassment as one form of disparate treatment of women, as I recommend, my point becomes even clearer: No one "welcomes" discriminatory treatment.

1. *The unwelcomeness requirement imposes an unreasonably harsh burden on plaintiffs.*

Meritor makes the unwelcomeness requirement the gravamen of any sexual harassment hostile work environment claim, and in *Harris* the Court continued

62. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

63. *See, e.g.*, Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 826-34 (1991) (arguing that the unwelcomeness inquiry is either gratuitous when the environment is not objectively hostile or punitive when the environment is objectively hostile); B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 28-30 (1993) (analogizing the unwelcomeness requirement to the "did she ask for it" inquiry in rape trials); Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 344 (1988) (arguing that the "unwelcomeness test is at root the product of an outdated stereotype").

64. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

65. *Meritor*, 477 U.S. at 69.

66. Indeed, the newly proposed EEOC guidelines on gender, national origin, and religious harassment cite the need to distinguish proper from improper sexual advances as the reason for treating hostile work environments based on sexual conduct under a different standard. Guidelines on Harassment, *supra* note 34, 58 Fed. Reg. 51,267 ("Sexual harassment continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis.").

to apply that requirement. In some circuits, proving unwelcomeness imposes a difficult burden indeed. For example, the First Circuit effectively holds that a plaintiff cannot state a hostile work environment claim unless she has explicitly taken action against her supervisor to head off the disparate treatment. *Lipsett v. University of Puerto Rico*[67] starkly articulated the plaintiff's responsibility to communicate to her supervisor that she did not welcome his behavior:

> [A] determination of sexual harassment turns on whether it is found that the plaintiff misconstrued or overreacted to what the defendant claims were innocent or invited overtures. A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a "great figure" or "nice legs." The female subordinate, however, may find such comments offensive. . . . [T]he man may not realize that his comments are offensive, and the woman may be fearful of criticizing her supervisor. . . . The [supervisor] must be sensitive to signals from the woman that his comments are unwelcome, and the woman . . . *must take responsibility for making those signals clear.*[68]

Similarly, in *Dockter v. Rudolf Wolff Futures, Inc.*[69] the Seventh Circuit revealed its tolerance for employers who create a hostile work environment:

> For the first few weeks, [Plaintiff's boss], as he occasionally did with other female employees at the office, made sexual overtures to—in the vernacular of the modern generation, "came on to"—her. Although Plaintiff rejected these efforts, her initial rejections were neither unpleasant nor unambiguous, and gave [the boss] no reason to believe that his moves were unwelcome.[70]

Because the district and circuit courts in *Dockter* accepted the propriety of some sexual conduct between supervisors and their employees, the plaintiff could not simply point to her rejection of the advances to prove their unwelcomeness. The kind of response that would be sufficient to prove unwelcomeness remains unclear. If a woman's response is at all ambiguous, either because she is not firm enough in her rejection (perhaps because she fears losing her job if she offends her boss) or because she happens to dress attractively, she not may be entitled to relief, as the plaintiff in *Dockter* found.[71] The woman therefore faces the dilemma of rejecting her boss convincingly enough to satisfy the court's demands while taking care not to be so forceful as to risk retribution.

Moreover, placing the burden of explicit communication on the plaintiff imposes unrealistic demands. While most workers may fear that criticizing their supervisors puts their jobs at risk, the problem may be magnified for wo-

67. 864 F.2d 881 (1st Cir. 1988).

68. *Id.* at 898 (emphasis added). The court did note that a woman may be able to communicate her disapproval in some circumstances if she consistently failed to respond to the supervisor's suggestive comments. *Id.*

69. 913 F.2d 456 (7th Cir. 1990).

70. *Id.* at 459 (quoting Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 533 (N.D. Ill. 1988)). In fairness, the 7th Circuit's approach may be evolving. *See* Carr v. Allison Gas Turbine Div., GMC, 32 F.3d 1007 (7th Cir. 1994) (reversing the trial court's dismissal of a hostile work environment claim involving harassment by coworkers).

71. *See* Estrich, *supra* note 63, at 829 (arguing that the outcome in *Dockter* means that "unwelcomeness may be judged not according to what the woman meant, but by the implication that the man felt entitled to draw. . . . [C]ourts, however, privilege *his* interpretation.").

men. Susan Estrich suggests that "less powerful, and economically dependent" women cannot be expected to express unwelcomeness.[72] Indeed, she questions whether there ever can be "such a thing as truly 'welcome' sex between a male boss and a female employee who needs a job."[73] Women who rely on their paychecks to support themselves and their families cannot go to great lengths to communicate the unwelcomeness of discriminatory behavior. Further, many women mistakenly think that an indirect approach to combat behavior they do not welcome is the most effective way to end it. For example, women may deflect offensive comments, make jokes back, or try to ignore the behavior.[74]

If we reconceptualize hostile work environment cases as gender-based disparate treatment rather than a form of *sexual* harassment, the absurdity of the unwelcomeness requirement comes into stark relief. Very little discriminatory behavior could ever be construed as "welcome." For example, few women welcome being the target of gender-based epithets or having their competence called into question because they are women. Similarly, most women *do not* welcome being "hit on" by their bosses at work,[75] much less having their bosses fondle them. The contrary assumption may stem from the misconception that hostile work environment claims are about sexual misconduct and not about discriminatory conduct.[76]

It is hardly surprising, therefore, that the "unwelcomeness" requirement has no analog in other types of discrimination law.[77] In the racial harassment context, courts *presume* that a plaintiff did not "welcome" being subjected to racial epithets.[78] Similarly, under the *McDonnell Douglas* disparate treatment framework, which governs both racial and gender discrimination cases, a plaintiff need not allege that she did not welcome being discriminated against in hiring or firing decisions.[79] We simply assume that plaintiffs do not welcome disparate treatment because of their race or sex—any suggestion to the contrary would strike us as bizarre indeed. If an employee is treated differently because of race or gender, that is enough. In this respect, hostile work environment claims should be treated no differently than other types of discrimination claims.

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72. *Id.* at 828.

73. *Id.* at 831.

74. *See* Gutek & Koss, *supra* note 51, at 37-38, 39-40 (citing numerous studies showing that many women use indirect strategies to cope with sexual harassment, even though they are not particularly effective in stopping harassment).

75. *See* notes 43-47 *supra* and accompanying text.

76. *See* texts accompanying notes 32, 35-36 *supra.*

77. I am not the first to make this observation. *See* Vhay, *supra* note 63, at 344 (stating that victims of discriminatory conduct based on race, national origin, or religion need not prove the unwelcomeness of the conduct).

78. *See, e.g.,* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (stating that a work environment can be "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers"), *cert. denied,* 406 U.S. 957 (1972).

79. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (applying the *McDonnell Douglas* burden-shifting framework to gender discrimination); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (setting out the elements of a prima facie case alleging racial or gender discrimination in hiring or firing decisions); note 28 *supra.*

Further, no other area of Title VII jurisprudence imposes on a plaintiff the burden of proving that he did nothing to encourage discrimination. Disparate treatment based on race or gender simply does not belong in the workplace. Yet, in the gender hostile work environment context, because the courts have presumed that a certain amount of sexual activity is desirable in the workplace,[80] a plaintiff must go to great lengths to establish that the conduct at issue in her particular case was beyond the pale. Since unwelcomeness is not at issue outside of the hostile work environment context in other gender-based disparate treatment cases, courts should accordingly assume that sexual behavior is presumptively offensive.

It is also perverse to rely on prevailing notions of what constitutes commonly acceptable behavior in the workplace in defining an objectionable workplace. As the Ninth Circuit observed in *Ellison v. Brady*,[81] doing so runs the risk of reinforcing prevailing discrimination: "Harassers could continue to harass merely because a particular discriminatory practice was common . . . ."[82] But Title VII was meant to change the workplace by replacing disparate treatment with equality, not to ensconce a discriminatory status quo. If, as the Supreme Court has stated, Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"[83] then the legal rules governing workplace behavior, including the elements of a claim for a violation of Title VII, must be tailored to enable women to have an equal position in the workplace. The standard for establishing liability in a Title VII hostile work environment claim should mirror this principle, because the whole point of the statute, and thus its enforcement, is to define what behavior is and is not acceptable in the workplace by reference to the principle of equality. Unacceptable behavior may cause only slight harm, but degree of harm is only an issue of damages. The failure to establish such a standard will necessarily produce slippage between the statutory guarantee of equality and the reality of the workplace; as a practical matter, supervisors may have little incentive to avoid conduct for which they will not be held liable.

There is a further problem with the unwelcomeness requirement. It shifts the inquiry from the discrimination itself to whether by her own conduct the plaintiff invited the discriminatory conduct.[84] By shifting the focus to the plaintiff's conduct and to her efforts to communicate her dislike of the defendant's behavior, the unwelcomeness requirement imposes an unfair burden on the plaintiff to protect herself from her supervisor's discriminatory conduct. Conversely, "no burden is placed on [the supervisor] to refrain from abusing his position of power"[85] by flirting with or propositioning his female subordinates.

80. *See* text accompanying notes 34-36 *supra.*

81. 924 F.2d 872 (9th Cir. 1991).

82. *Id.* at 878.

83. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (internal quotation marks omitted).

84. Estrich, *supra* note 63, at 827.

85. *Id.* at 828.

2. *The unwelcomeness requirement unjustifiably deters plaintiffs from bringing suit.*

Besides placing an unreasonable burden on plaintiffs to prove that they did not welcome the discriminatory conduct, the unwelcomeness requirement also deters plaintiffs from bringing meritorious claims. As currently configured, the unwelcomeness requirement enables and encourages defense attorneys to engage in discovery tactics that deter both "imperfect" and "perfect" plaintiffs from filing suit. Even with "perfect" plaintiffs, the unwelcomeness requirement provides an opportunity for defense attorneys to seek discovery about all aspects of a woman's sexual life, and many take full advantage of that opportunity to discourage plaintiffs from pursuing their claims.[86] If evidence of plaintiff's speech, dress, and expressions of sexual fantasies at work are "obviously" relevant,[87] then evidence of any involvement with other men at work—or any men at all—would be relevant as well. The fear of having her personal life, with all of its imperfections,[88] exposed and paraded in court by adverse attorneys most likely overwhelms and discourages the average plaintiff and prevents her from bringing a legitimate claim.[89]

Additionally, the criminal law analog to sexual harassment—rape—excludes evidence of the victim's reputation or of prior sexual conduct with a person other than the defendant offered to prove consent.[90] Although courts do

86. Evidence about a woman's sexual history may be introduced to show that the woman welcomed the conduct, or under the pervasiveness requirement, to show that her reaction to the conduct at issue was not reasonable because her past sexual history has made her unreasonably sensitive. "[D]efense lawyers, contending they are only doing their duty to clients, are going straight into the bedroom. In sexual harassment cases, they are challenging the way women talk, dress and behave in an effort to prove that the plaintiff 'welcomed' a boss's behavior . . . ." Ellen E. Schultz & Junda Woo, *Plaintiff's Sex Lives Are Being Laid Bare In Harassment Cases,* WALL ST. J., Sept. 19, 1994, at A1. Using such evidence, and the discovery process to elicit it, to discredit a plaintiff or to discourage her from pursuing her claim is becoming more and more commonplace, ironically since the 1991 Civil Rights Act passed. The Act makes it easier for women to recover damages for sexual harassment by allowing them to recover for emotional distress and punitive damages. 42 U.S.C. § 1918a(a), b (Supp. V 1993). The Act "raised the stakes so sharply that defense lawyers are increasingly resorting to harsh tactics, asking about sex lives, childhood molestation, abortions and venereal disease." Schultz & Woo, *supra,* at A1. Since sexual harassment cases are now more expensive, they can no longer be settled by defendants; they must be won. *Id.* Margaret A. Harris, chair of the Sexual Harassment Committee for the National Employment Law Association, says that she regularly faces discovery battles with defense attorneys seeking to pry into the sexual history of her clients: "My day-to-day sexual harassment pretrial litigation involves defense attorneys trying to portray my clients as whores." Telephone Interview with Margaret A. Harris (Oct. 25, 1994).

87. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (stating that evidence of the plaintiff's sexually provocative speech or dress and her sexual fantasies was "obviously relevant").

88. As Estrich points out, perfect hostile work environment plaintiffs are few and far between. *See* Estrich, *supra* note 63, at 830-31 (noting that the behavior of both "traditional" women who act femininely and "untraditional" or "unfeminine" women will be used against them under the unwelcomeness analysis).

89. As Estrich argues,

> Under the old rule in rape cases, a woman's sexual history might be relevant regardless of the circumstances of the assault. In most cases, the effect was not to improve the truth-seeking process of the courts, but to discourage women from filing complaints in the first instance. "Welcomeness"—defined in sexual harassment doctrine to include the woman's dress, language, habits, and even sex life—may play a similar role.

Id. at 833.

90. FED. R. EVID. 412.

permit prosecutors to present accounts of the victim's dress and demeanor at the time of the rape, evidence about the victim's general demeanor, method of dress, or prior sexual experiences is not allowed.[91] Rule 412 of the Federal Rules of Evidence at least calls into question whether the kind of evidence *Meritor* classifies as "obviously relevant" to whether a woman welcomed the harassing conduct[92] is indeed relevant. As with rape shield laws, courts should allow evidence of a plaintiff's consent to a particular act or previous consent only with respect to the same defendant. *Meritor*'s endorsement of evidence that Rule 412 regards as inadmissible is unjustified and punitive,[93] especially since in a criminal rape trial a defendant has much more at stake in proving his innocence than does a civil defendant in a hostile work environment case. If the justice system is willing to exclude arguably legally relevant evidence to a criminal defendant's innocence in order to protect women victims from humiliating questioning, civil cases should strike a similar balance.

Although the unwelcomeness requirement is both unreasonable and unnecessary, the EEOC pushed for an "unwelcomeness" requirement in its brief to the Supreme Court in *Meritor*,[94] contending that consensual sex in the workplace should not form the basis of a Title VII action.[95] The implicit argument is that women who have engaged in consensual relationships at work that have failed will use Title VII as a retaliatory measure against their former lovers.[96] The threat of the scorned woman charging her supervisor with creating a hostile work environment without cause is, as in the rape context, completely overblown. The costs of filing a lawsuit, which include damaged relationships at work and severe loss of privacy, are prohibitive. As Estrich argues,

> Start with embarrassment, loss of privacy, and sometimes shame. . . . Empirical studies suggest that possibly actionable harassment is widespread, even endemic, but the number of lawsuits, not surprisingly, does not bear out this possibility. Anything [that] adds another disincentive [to bringing a lawsuit to vindicate one's rights under Title VII], as the . . . unwelcomeness requirement surely does, ought to be supported by a strong justification. . . . [T]he unwelcomeness inquiry certainly is not.[97]

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91. *See, e.g.*, Wood v. Alaska, 957 F.2d 1544, 1550-54 (9th Cir. 1992) (excluding as irrelevant evidence that the rape victim posed nude for *Penthouse*, acted in pornographic movies, and excluding as prejudicial that the victim told defendant about her movies and showed defendant her *Penthouse* pictures); United States v. Saunders, 943 F.2d 388, 391-92 (4th Cir. 1991) (upholding the trial court's exclusion of evidence that a rape victim had sexual relations with defendant's friend and had a reputation for being a prostitute), *cert. denied*, 112 S. Ct. 1199 (1992); Doe v. United States, 666 F.2d 43, 47-48 (4th Cir. 1981) (ruling inadmissible evidence of a rape victim's general demeanor and reputation as sexually promiscuous).

92. *Meritor*, 477 U.S. at 69.

93. *See* Estrich, *supra* note 63, at 827, 833 (arguing that the evidentiary focus on the woman puts the victim on trial and may deter women from pursuing valid claims).

94. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 13, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979).

95. *Id.*

96. *Id.* at 15 (arguing that courts must "ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may penalize the other").

97. Estrich, *supra* note 63, at 833-34.

We should not expect that women would file more fallacious hostile work environment claims than plaintiffs in any other civil actions would. If anything, the costs involved likely cause women to sue less frequently than the law allows. In fact, a major federal study estimated that women report only 5 percent of harassing behaviors.[98] Given this backdrop of extreme underreporting, courts should not worry that a significant number of women will abuse the court system with fallacious hostile work environment claims.

B. *The Pervasiveness Requirement: An Unfairly High Hurdle*

Judicial tolerance for some level of sexual conduct in the workplace underlies the pervasiveness requirement, just as it does the unwelcomeness requirement. To state a successful hostile work environment cause of action, a plaintiff must show that the discriminatory conduct was "severe or pervasive enough to create an objectively hostile or abusive work environment."[99] As the Court first stated in *Meritor* and repeated approvingly in *Harris*, a "mere utterance of an . . . epithet [that] engenders offensive feelings in a[n] employee" is not sufficient to constitute actionable disparate treatment in the workplace.[100] Other courts have asserted this threshold even more strongly: "[C]asual or isolated manifestations of a discriminatory environment, such as a *few . . . slurs, may not raise* a cause of action."[101]

98. SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT, *supra* note 56, at 27, *cited in* Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases,* 72 N.C. L. REV. 499, 523 (1994).

99. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

100. *Id.* (quoting *Meritor,* 477 U.S. at 67) (internal quotation marks omitted) (alteration in *Harris*). This analysis first appeared in Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972), which involved racial harassment.

101. Downes v. FAA, 775 F.2d 288, 293 (Fed. Cir. 1985) (applying a rationale originally addressing ethnic and racial slurs to a gender hostile work environment case) (quoting Bundy v. Jackson, 641 F.2d 934, 943 n.9 (D.C. Cir. 1981)) (internal quotation marks omitted). Even the EEOC guidelines reflect this permissive attitude toward sexual conduct at work, suggesting that a single request for a date from a supervisor, absent coercive behavior, is not actionable under Title VII because it does not alter the working conditions of the plaintiff. *See* Cobbins v. School Bd. of Lynchburg, No. 90-1754, 1991 U.S. App. LEXIS 526, at *7 (4th Cir. Jan. 14, 1991) (interpreting the EEOC guidelines to mean that "a single request, absent a coercive demand or ultimatum, most likely would not amount to the establishment of a hostile work environment") (unpublished case); *see also* Cathleen Marie Mogan, Note, *Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants from Having Their Cake and Eating It Too,* 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 559-60 (1992) (discussing *Cobbins*). *But see* King v. Hillen, 21 F.3d 1572, 1581 (Fed. Cir. 1994) (holding that the EEOC guidelines require a court to look at the totality of the circumstances, not at each isolated incident). Many courts reflect this attitude in their rejection of claims that represent disparate treatment based on the employee's gender. For instance, in *Downes* the court found that the plaintiff failed to demonstrate that the discriminatory conduct to which she was subjected was pervasive enough, even though her employer speculated in her presence about the frequency of her sexual relations after her divorce, called her the office "Dolly Parton," and touched her hair on two occasions. *Downes,* 775 F.2d at 293-94.

1. *The pervasiveness requirement allows instances of disparate treatment to go unpunished.*

The pervasiveness requirement sanctions a certain amount of gender-based disparate treatment in the workplace. *Jones v. Flagship International*,[102] for example, reflects this tolerance of some sexual conduct at work. In *Jones*, the plaintiff's supervisor propositioned her on three separate occasions, even after she had asked him to stop. On another occasion, he told her his wife did not know he was back in town and that the plaintiff "needed the 'comfort of a man.' "[103] And yet another time he informed her that she was "off the hook" because one of his friends was interested in her.[104] The court failed to find that Jones suffered any tangible job detriment and concluded that her supervisor's conduct was not severe enough to have created a hostile work environment in violation of Title VII.[105]

Furthermore, the courts' imposition of the pervasiveness requirement has prevented women from asserting valid claims of a hostile work environment. The Sixth, Seventh, Federal, and Eleventh Circuits, for example, applied a pervasiveness standard that required a plaintiff to demonstrate serious psychological harm,[106] until the Supreme Court struck that standard down in *Harris*.[107] That courts would apply such an onerous standard reflects a judicial belief that sex in the workplace is generally unobjectionable. According to these courts, conduct tolerated under Title VII could include referring to women as "cunts" and "fat ass" and referring to their "tits,"[108] prominently displaying photographs of nude or partially clad women,[109] asking a woman to negotiate her

102. 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). Although this case predates *Meritor*, the 5th Circuit applied the same general analysis. *Compare Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' ") (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (alteration in *Meritor*) *with Jones*, 793 F.2d at 719-20 ("[T]he sexual harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment . . . .").

103. *Jones*, 793 F.2d at 716.

104. *Id.*

105. *Id.* at 720-21. Unfortunately, other courts have tolerated gender-based discriminatory treatment in the workplace. *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1409-10, 1415 (10th Cir. 1987) (overturning the district court's conclusion that two supervisors' acts of grabbing plaintiff's breasts, touching her buttocks, and rubbing her thigh were merely isolated incidents and were not pervasive enough to create an abusive working environment); Christoforou v. Ryder Truck Rental, Inc., 668 F. Supp. 294, 298-300 (S.D.N.Y. 1987) (holding that a supervisor's conduct was not pervasive enough to create a hostile work environment even though he propositioned plaintiff, touched her thigh and hair, and told her to "be more modern in her attitudes" toward having affairs, because the conduct was nothing but a few "scattered incidents").

106. *See* Brooms v. Regal Tube Co., 881 F.2d 412, 418-20 (7th Cir. 1989); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989); Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Downes v. FAA, 775 F.2d 288, 292 (Fed. Cir. 1985).

107. *Harris*, 114 S. Ct. at 370-71.

108. Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 423 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

109. *Id.*

raise at the local motel,[110] telling her that her "ass was so big" that if she wore a bikini there would be an eclipse,[111] and querying whether the woman had to sleep with a client to get him to sign an important deal.[112] The courts did not find this conduct severe enough to affect seriously the plaintiffs' psychological well being. While the Supreme Court may have thought it remedied this problem in *Harris,* because that case relies on the *Meritor* standard, which gave rise to such cases in the first place, there may be little reason for such optimism.

While there is no compelling reason why a plaintiff should have to prove that the discriminatory behavior she endured was "pervasive," there are powerful reasons why a plaintiff should not have to. The type of incidents that some courts have dismissed as trivial affect women deeply.[113] Many may agree that a supervisor should never be allowed to call his subordinates gender-based epithets, and many may even agree that one such incident should be actionable. Yet the courts have never seriously entertained a "zero tolerance" stance toward supervisors' asking their subordinates out on dates. Even Gutek hesitates to condemn dating in the workplace altogether,[114] although her analysis on sex role spillover could be read to support such a stance.[115] We may hesitate to desexualize a workplace by forbidding relationships between supervisors and their subordinates and consider such a position extreme.[116] The costs and benefits involved in prohibiting a supervisor from asking his subordinate out on a date, flirting with her, or complimenting her on her new hairstyle, however, weigh in favor of prohibiting such conduct to the extent that it involves an unequal power arrangement. Because of the inherent power differential in relationships between supervisors and subordinates, being asked for a date may put a subordinate in a very uncomfortable situation, and being complimented on physical appearance may make a woman feel that her appearance garners more attention than her work. Moreover, since supervisors exercise control over a

110. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 3, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168).

111. *Id.* at 3 n.3.

112. *Id.* at 4. The magistrate in *Harris* recognized that these comments were offensive but nonetheless concluded that Harris was not harmed severely enough psychologically to allege a Title VII violation. Harris v. Forklift Sys., Inc., 60 Empl. Prac. Dec. (CCH) ¶ 42,070, at 74,250 (M.D. Tenn. 1990), *aff'd,* 976 F.2d 733 (6th Cir. 1992), *rev'd,* 114 S. Ct. 367 (1993). The district court reached this conclusion even though Harris testified that she could not sleep, lost all desire to go to work, cried frequently, began drinking heavily, and that her personal relations suffered. *Id.* at 74,247.

113. *See* notes 40-57 *supra.*

114. *See* GUTEK, *supra* note 38, at 173 (rejecting a "return to 'outlawing' dating").

115. *See* notes 38-39 *supra* and accompanying text.

116. Barring supervisors from asking subordinates out on dates, complimenting them on their physical appearance, or touching them does not represent an extreme position and may be the only truly effective way to prevent harassment. Even *Parade,* a Sunday newspaper insert not generally known for its extreme left-wing, radical-feminist positions, recommends that males in the workplace err on the side of caution and refrain from what the courts would generally consider nonactionable behavior. *Parade*'s recommendations included, for example, relying on courtesy rather than contact (offer handshakes rather than hugs, and encouraging words, not pats on the back); using a same-sex standard (ask yourself whether you would tell a male colleague you liked the way he styled his hair); and complimenting female colleagues on the quality of their work rather than their appearance. Dianne Hales & Dr. Robert Hales, *Can Men and Women Work Together? Yes, If . . .,* PARADE MAG., Mar. 20, 1994, at 10, 11. The authors put it succinctly, "A kiss is still a kiss, a hug is still a hug, a joke is still a joke—except at work, where they could spell trouble." *Id.* at 10.

subordinate's career path, such requests or comments, even well-intentioned ones, may be inherently coercive. A subordinate may not feel as free to turn down her supervisor as she would someone outside of the workplace or even a coworker, nor may she feel as free to tell a supervisor that his compliments about her appearance make her feel uncomfortable. This means that women are being treated differently than men, and that is enough.

Recognizing the danger of the power imbalance in these situations, some universities have recognized the inherent potential for coerciveness in professor-student relationships and have banned even "mutual" relationships between professors and their students.[117] Professor-student relationships are somewhat different from supervisor-subordinate relationships—they are at once both more and less coercive. They are more coercive because professors are generally much older than students, which may make students more vulnerable. They also may be less coercive in the sense that a student may have less at stake. While a student may risk getting a bad grade from a professor, at least at the undergraduate level, she may be able to avoid him by taking classes with other professors in the future. Her ability to avoid both the objectionable behavior and its consequences may be greater than in the employment context. Most likely, the student's future career is not on the line. In contrast, if a subordinate turns down a supervisor for a date and angers him, her career and livelihood may be at stake. Transferring to another job may also be more difficult than dropping classes. None of this suggests that harassment of an undergraduate by a professor should be taken lightly or tolerated. I suggest only that school administrators have acknowledged the potential for coercion and have implemented bans on dating and the like in settings where less may be at stake than in the workplace.[118]

In the workplace context, at least one San Francisco law firm has recognized the coerciveness inherent in the differential power of supervisors and subordinates. This law firm requires that if two attorneys are dating, and one is in a supervisory relationship to the other, they cannot work on the same case,

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117. Harvard University, for example, bans all professor-student dating because

> [a]morous relationships that might be appropriate in other circumstances are always wrong when they occur between any teacher . . . and any student for whom he or she has a professional responsibility. . . . Implicit in the idea of professionalism is the recognition by those in positions of authority that in their relationships with students there is always an element of power . . . . with which they are entrusted . . . .

PALUDI & BARICKMAN, *supra* note 47, at 10 (quoting the Harvard University Policy on Sexual Harassment). The University of Iowa takes a similar stance:

> A faculty member who fails to withdraw from participation in activities or decisions that may reward or penalize a student with whom the faculty member has or has had an amorous relationship will be deemed to have violated his or her ethical obligation to the student, to other students, to colleagues, and to the University.

Id. (quoting the University of Iowa Policy on Sexual Harassment).

118. The Harvard and University of Iowa bans on professor-student dating extend to relationships between graduate students and professors, *see* note 117 *supra,* which may be more closely analogous to workplace dating between supervisors and subordinates than undergraduate student-professor dating. Graduate students may work for professors on long term projects and rely heavily on the development of that relationship to further their careers. Graduate students may also work closely with only one professor because of specialization in study.

and one of them must be transferred to another work assignment.[119] Thus, some workplaces and universities have recognized that our general acceptance of workplace dating and flirtation may be more harmful than we tend to treat it, at least when it involves persons in positions of unequal power. Our gut reaction that a certain amount sexual conduct is desirable, or at least not harmful at work, needs rethinking.

2. *Title VII should not tolerate any instances of disparate treatment.*

Requiring that the disparate treatment of women be pervasive is at odds with Title VII's language. According to *Meritor*, Congress intended Title VII's requirement that an employer refrain from discriminating against an employee "with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex"[120] to " 'strike at the *entire spectrum* of disparate treatment of men and women' in employment."[121] This language does not support a requirement that discrimination be pervasive before it can be actionable. Thus, in adopting the pervasiveness requirement, *Meritor* adopted a standard that squarely contradicts the purpose of Title VII as Congress envisioned it.

Despite its continued insistence that a plaintiff demonstrate that the discriminatory treatment she endured was pervasive, the Court has never offered a persuasive justification for this restriction in hostile work environment causes of action.[122] The Supreme Court and lower courts likely have feared creating a cause of action that enables plaintiffs literally to make a "federal case"[123] out of stray remarks in the workplace. In other words, judges may believe that recognizing claims based on gender discrimination will open the floodgates to "frivolous" lawsuits. Early cases that resisted recognizing gender-based hostile work environment claims stated this concern openly. One court feared that recognizing hostile work environment claims based on an employer's asking an employee out on a date would require "4,000 federal trial judges instead of

119. Law Firm Policy Regarding Employee Relationships (Aug. 16, 1994) (redacted copy on file with the *Stanford Law Review*) (firm name withheld by request).

120. 42 U.S.C. § 2000e-2(a)(1) (1988).

121. *Meritor*, 477 U.S. at 64 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (emphasis added).

122. Courts have repeatedly cited Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), as support for the pervasiveness requirement. *Rogers* was the first case to recognize that harassment in the workplace (in *Rogers*, racial harassment) could in and of itself violate Title VII. *See id.* at 238 (asserting that Title VII should be interpreted broadly to proscribe conduct that creates "a working environment heavily charged with ethnic or racial discrimination"). Importantly, the language for which *Rogers* is repeatedly cited, "that an employer's mere utterance of an ethnic or racial epithet [that] engenders offensive feelings in an employee" does not violate Title VII, *id.*, is dicta. The 5th Circuit did not say that such conduct could not violate Title VII, just that the court was not willing to recognize such a low threshold at that time. If, as Justice Holmes said, "[i]t is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV," Oliver Wendell Holmes, The Path of the Law, Address at Boston University School of Law (Jan. 8, 1897), *in*, 10 HARV. L. REV. 457, 469 (1897), the pronouncement of the 5th Circuit in 1971 can hardly be the last word on the subject.

123. George, *supra* note 63, at 22.

some 400."[124] Another worried that recognizing hostile work environment claims would result in "a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another,"[125] while yet another predicted that "flirtations of the smallest order would give rise to liability."[126] It is also possible that this concern arises from the unrealistic fear of women bringing retaliatory suits against former lovers.[127]

Yet administrative concerns alone are an insufficient basis for denying women relief for the discrimination they suffer. Judicial fear of opening the floodgates simply cannot by itself provide an adequate response to the charge that disparate treatment in working conditions *is* disparate treatment, no matter how unpervasive it is.[128] First, given that women file very few hostile work environment claims, as a practical matter the fear of opening the floodgates is utterly overblown.[129] Second, given the costs associated with asserting hostile work environment claims, it is unlikely that women will abuse the cause of action to bring frivolous lawsuits.[130] And finally, if a doctrine that allows women to bring valid claims of gender-based disparate treatment creates a flood of claims, so be it. Ultimately, Title VII is a tool to vindicate a person's right to be free from discriminatory treatment. If there is so much discriminatory treatment against women that it creates a flood of claims, that should not stand in the way of a woman's vindication of her rights. If anything, the courts' refusal to deal with actual cases of disparate treatment will only encourage continued discrimination against women.

3. *The pervasiveness requirement confuses a question of damages with a question of liability.*

The courts' reliance on the pervasiveness of the harm confuses liability with damage. A requirement like pervasiveness is irrelevant to whether discrimination has actually occurred. Whether a supervisor or employer discriminated against an employee does not and logically cannot turn on the employee's reaction to the discrimination.[131] Similarly, the occurrence of disparate treat-

124. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd,* 568 F.2d 1044 (3d Cir. 1977).

125. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated,* 562 F.2d 55 (9th Cir. 1977).

126. Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd on other grounds,* 600 F.2d 211 (9th Cir. 1979).

127. *See* text accompanying notes 94-98 *supra.*

128. Suppose an employer purposely paid an African-American employee $1 less on only one occasion. Certainly such an action would violate Title VII, although the plaintiff's damages might be limited to $1. I argue that the same standard should apply to gender-based disparate treatment when it concerns derogatory comments or sexual requests. *Cf.* George, *supra* note 63, at 21-22 (making a similar argument with respect to the triviality of gender-based harassment, but favoring a sliding scale standard for liability to vary with pervasiveness). Professor George argues that the more trivial the conduct, the more pervasive it ought to be before it counts as a Title VII violation. *Id.*

129. *See* text accompanying note 98 *supra.*

130. *See* texts accompanying notes 86-89 & 97 *supra.*

131. Notably, none of the other Title VII causes of action for discrimination require a plaintiff to prove that she suffered emotional harm to state a cause of action for discrimination. *See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228, 239-42 (1989) (stating the requirements for a mixed-motive

ment does not depend on whether an objectively reasonable person would be offended by the discrimination. Disparate treatment is an objectively verifiable event: At bottom, whether discrimination has occurred depends on whether an employer treats an employee differently from other employees because of her gender. Nothing more, nothing less.

In short, current doctrine has it backwards. Sexual conduct at work between supervisors and subordinates *is* disparate treatment and should therefore be presumed illegitimate.[132] We similarly should refuse to tolerate disparaging comments that target women based on their gender. As Professor George put it,

> The courts' underlying assumption in hostile environment cases remains unchallenged: [W]hen men and women work in the same environment, some "flirting" or other comparable behavior is inevitable and appropriate. Our assumption should be just the opposite: [S]exually oriented conduct or discussions in the workplace are generally demeaning to women and, therefore, improper.[133]

If we reverse our assumptions about the appropriateness of sexual conduct between supervisors and subordinates at work, we can no longer countenance supervisors asking their subordinates out on dates without the "employer . . . bear[ing] the risk that the supervisor's conduct [may disturb] the victim to the extent that she [would be] willing to pursue a claim."[134] If our goal truly is to achieve gender equality in the workplace and to fulfill Title VII's mandate to "strike at the entire spectrum" of disparate treatment in the workplace based on gender, this sacrifice does not seem too high a price to pay. In the end, after all, the workplace is for work.[135] And if certain behavior discriminates against

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cause of action); McDonnell Douglas Corp. v. Green Corp., 411 U.S. 792, 802 (1973) (enumerating the prima facie requirements for a disparate treatment cause of action).

132. George, *supra* note 63, at 18 (arguing that if a supervisor fondles a subordinate or comments on her anatomy, the conduct is discriminatory).

133. *Id.* at 22-23.

134. *Id.* at 23.

135. Some may fear that a Title VII standard as stringent as the one I propose poses 1st Amendment problems. Although a 1st Amendment challenge to Title VII has never reached the Supreme Court, the Court's continued acceptance of Title VII restrictions on speech suggests that the Court recognizes that the workplace is different than a street corner or a public meeting place. Indeed, workplace restrictions on speech, including political speech, have been upheld by the Court when interference with the work environment has been shown. For example, in Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985), the Court upheld an executive order expressly excluding legal defense and political advocacy groups from the charities included in the Combined Federal Campaign—a fundraising drive conducted by federal employees during work hours. The Court upheld this restriction on political speech because "[t]he federal workplace, like any other place of employment, exists to accomplish the business of the employer. . . . [Thus], the Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees." *Id.* at 805-06 (footnotes omitted). In light of *Cornelius,* even stringent Title VII workplace restrictions on nonpolitical speech that are specifically aimed at enhancing workers' ability to do their jobs likely will not collide with the 1st Amendment. *See* Connick v. Myers, 461 U.S. 138, 154 (1983) (upholding the discharge of a government employee for circulating a questionnaire concerning internal office affairs because the "limited First Amendment interest involved here does not require that [an employer] tolerate action which he reasonably believe[s] would disrupt the office . . . and destroy close working relationships"); David F. McGowan & Ragesh K. Tangri, Comment, *A Libertarian Critique of University Restrictions of Offensive Speech,* 79 CAL. L. REV. 825, 902 n.377 (1991) ("Speech in the

women in the workplace and interferes with women's ability to be effective employees, we should be willing to curtail such behavior in favor of productivity. As my discussion above indicates, even one respectful request for a date from a supervisor can harm women in the workplace.[136] Because the request itself may be inherently coercive, it can undermine their position as workers, highlight their position as sex objects, and affect their work environment adversely.[137]

IV. REDESIGNING THE HOSTILE WORK ENVIRONMENT CAUSE OF ACTION: RECOGNIZING A CAUSE OF ACTION BASED ON "DISPARATE TREATMENT"

Courts should reconceptualize hostile work environment claims as gender-based treatment that affects the conditions of an employee because of her gender, rather than as a form of sexual harassment. Such a reconceptualization would establish that a hostile work environment action is simply a cause of action for disparate treatment and would dispel confusion over whether an instance of sexual conduct or a sexual comment are inappropriate in the workplace. Discrimination is always presumptively inappropriate in the workplace.

A. *Eliminating "Unwelcomeness" As a Requirement To Prove Liability*

Reframing sexual harassment as gender-based disparate treatment has ramifications for the unwelcomeness requirement as well. Currently, courts seem to characterize hostile work environment cases as involving essentially unobjectionable and harmless behavior taken too far. Because courts generally perceive less egregious forms of sexual conduct as harmless, a plaintiff must show that she actually did find the particular behavior unwelcome. In contrast, if we instead presume that sexual conduct or gender-based disparagement is unacceptable workplace conduct because it is inherently discriminatory, logic leads us to the conclusion that disparate treatment in gender hostile environment cases is, as in all other kinds of disparate treatment cases, presumptively unwelcome.

Plaintiffs should not bear the burden of proving that they found the disparate treatment unwelcome. As in other areas of Title VII jurisprudence, courts should presume such conduct is unwelcome. In order to protect defendants

workplace is controlled in part because work is compelled for the majority of people—workers are a true captive audience. If they leave their posts to avoid offensive speech, they will either literally be leaving their jobs or they will be fired.").

136. Admittedly, Gutek shies away from condemning dating in the workplace. GUTEK, *supra* note 38, at 173 ("I am not advocating a return to 'outlawing' dating . . . ."). If we take her analysis that the introduction of sex roles in the workplace undermines women's status to its logical conclusion, however, dating in the workplace does indeed undermine women's positions at work.

137. This hard-line stance obviously does not come without tradeoffs. "An uncompromising judicial stance on sexual harassment may effectively dissuade some men from all warm, personal interaction with female subordinates . . . for fear of being charged with sexual harassment." George, *supra* note 63, at 24. This would be a gross overreaction, though. "[M]en can support their female colleagues in a warm and personal manner without risking misinterpretation. . . . [Men can, for example,] support women employees through compliments about their work instead of their appearance." *Id.*

from retaliatory suits, a supervisor should be able to assert as an affirmative defense (and bear the burden of proof) that the plaintiff indeed welcomed the conduct.[138] To assert the affirmative defense, the defendant should be required to prove that the plaintiff initiated the particular conduct in question. In other words, if whether a plaintiff welcomed her supervisor telling her dirty jokes in the workplace is at issue, a defendant should have to prove that the plaintiff initiated the telling of dirty jokes. Evidence that plaintiff took part should not be sufficient to demonstrate welcomeness. A plaintiff may join in behavior that she finds distasteful and offensive simply because she does not want to "make waves" or she believes it will help her "fit in" or cope with an unpleasant situation.[139] Similarly, if a defendant asserts that a plaintiff actually welcomed him asking her out on dates or propositioning her, he should have to prove that she initiated such conduct.

Courts should also strictly limit the kind of evidence admissible to prove welcomeness; otherwise defendants could turn discovery into a fishing expedition to discourage a plaintiff from pursuing an otherwise meritorious lawsuit. *Meritor*'s holding that evidence of a plaintiff's dress and personal fantasies are plainly admissible to prove welcomeness should be reversed, either by Congress or the Supreme Court at the earliest possible opportunity. Aside from being of questionable probative value in proving whether a plaintiff "welcomed" particular conduct from her supervisor, evidence of the plaintiff's clothing, comments about the people she dates, or her dating habits with men other than the defendant, should not be admissible to prove whether the plaintiff initiated the questioned conduct. Instead a defendant should have to show unequivocally that a plaintiff initiated the conduct to rebut the presumption of unwelcomeness.

Such a position is not as extreme as it may sound at first blush. Under this new approach, a supervisor who initiates sexual contact with a subordinate will be liable for any harm he causes, no matter how insignificant. What is wrong with that? The likely consequences would be to deter supervisors from initiating such contact unless they were quite certain that it would be welcomed and to encourage them to avoid intimidating conduct entirely. In spite of such results, people will still manage to find mates. But some might object further that a supervisor could still be liable even if he *was* reasonably sure that his advances would be welcome and even if he did avoid taking advantage of his

138. George also suggests transforming the unwelcomeness requirement into an affirmative defense. *Id.* at 19, 29. His definition of "welcomeness," however, gives employers more room to maneuver than does my argument that the plaintiff must actually have initiated the conduct in question to have welcomed it. He suggests that a defendant may prove welcomeness by "establishing that the plaintiff 'welcomed' the behavior through specific words or gestures to which the supervisor responded in kind." *Id.* at 19 (footnote omitted). The problem with a standard like George's is that it leaves the door open for courts to infer welcomeness from what the defendant may have interpreted as the plaintiff's "provocative" behavior. In other words, George's standard allows supervisors to initiate conduct and then to justify that conduct *post hoc* based on assertions that the plaintiff had actually welcomed it.

139. *See* Morris v. American Nat'l Can Corp., 730 F. Supp. 1489, 1495 (E.D. Mo. 1989) (holding that joining in profanity and nonsexual pranks could have been part of plaintiff's effort to fit in, and did not imply welcomeness of sexually explicit conduct and materials), *aff'd in part and rev'd in part*, 941 F.2d 710 (8th Cir. 1991).

superior position of power. This is so. In such an event, of course, the supervisor is unlikely to be liable for much, because he will have caused little or no harm. The fact of the matter is that the line of liability cannot be perfectly drawn. As it is now, women are subject to unwanted advances that, however polite, divert attention from their roles as workers, force upon them the role of sex objects, and impede their ability to do their work. This state of affairs must exist, the present doctrine says, because it is better than a state of affairs where men might be deterred from polite sexual advances and where women might bring "trivial" lawsuits. The latter concern forces women to suffer an actual harm to forestall a hypothetical and unlikely burden. The former concern is, under Title VII's mandate for equality, too insignificant to justify the present doctrine. Whatever harm might occur to polite suitors or subordinates too shy to initiate contact on their own is outweighed by the harm to *all* women in the status quo.

The current standard allows for confusion on both sides due to miscommunication and misinterpretation. A narrower, bright-line rule provides employers and employees with a clearer idea of when sexual conduct at work is welcome and appropriate and when it is not. If a defendant were required to prove that a plaintiff initiated the conduct in question, we would no longer have to worry that the plaintiff miscommunicated "welcomeness" by remaining silent about conduct she found objectionable because she feared negative consequences.[140] This bright-line rule would also ameliorate our concern about whether subordinates can ever truly consent to sexual advances from their supervisors because of the power differential inherent in the relationship. In other words, if a defendant could only successfully defend himself on welcomeness grounds by demonstrating that a plaintiff actually initiated the conduct, we would not have to worry that the plaintiff acquiesced to her boss's advances because she feared saying no.

B. *Pervasiveness: Merely a Question of Damages*

A plaintiff should not have to demonstrate that the conduct or comments she suffered were pervasive or severe enough to create an objectively or subjectively abusive working environment in order to state a claim under Title VII. She should need only to demonstrate that (1) because of her gender, (2) she was treated differently than men in the office, and (3) that this treatment reflected invidious stereotypes about women. In developing this prong of the test, hostile work environment jurisprudence should follow the general contours of Fourteenth Amendment sex discrimination jurisprudence. Under the Fourteenth Amendment, if women are treated differently than men and that treatment reflects invidious stereotypes about women, the discriminatory treatment

140. *See* text accompanying notes 72-74 *supra*. Women may also intentionally hide their feelings of unwelcomeness: "Perhaps she does not want to hurt the man or is afraid of negative repercussions if she were open about her feelings. This fear of repercussions is understandable since women are more likely than men to suffer adverse consequences of such encounters." GUTEK, *supra* note 38, at 58-59.

is actionable, unless a defendant provides a firm basis for the differential treatment.[141]

Conduct and comments that courts have previously considered trivial take on new significance when viewed in light of the stereotypes on which they are based. In *Downes v. FAA*, for example, a supervisor stroked the plaintiff's hair because he said he thought it was important to women to be complimented on physical appearance.[142] The court did not find such behavior actionable because the court did not find it sufficiently pervasive.[143] Under the standard I propose, such conduct would be actionable under Title VII. The supervisor's conduct toward his subordinate embodied a negative stereotype about the woman's desire to be treated as an attractive sex object at work. Similarly, comments that imply the negative stereotype that a woman's gender prevents her from doing her job effectively, like the kind of comments Teresa Harris suffered from her boss, would also be actionable.

Liability should attach even if the incident involved a single discriminatory comment or incident. Employers should not escape liability for gender discrimination simply because they do not engage in it often.[144] Under the *McDonnell Douglas* disparate treatment analysis, the law does not tolerate instances of de minimis discrimination.[145] Since the conduct that creates a hostile work environment essentially constitutes disparate treatment, we should not tolerate such discriminatory behavior simply because it does not rise to some standard of "pervasiveness."

Instead, the question of severity should be reserved, as it is in disparate treatment causes of action, to mitigate damages. In order to prevent the question of pervasiveness or severity from affecting determinations of liability, courts should bifurcate hostile work environment into separate liability and damages phases, as courts do in mixed-motive cases.[146]

V. CONCLUSION

Title VII prohibits discrimination in the workplace based on gender. It does not create a code of conduct for courting at work. To the extent a woman's work environment invidiously takes note of her gender, she suffers discrimina-

141. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-26 (1982).

142. 775 F.2d 288, 294-95 (Fed. Cir. 1985). As the supervisor described the incident, he went "by her desk and [placed his] fingers on a couple of strands of [her] hair . . . and said, '. . . your hair looks great that way.' " *Id.* at 294. He explained, "It was a gesture of friendliness or whatever you want to call it, or understanding or appreciation of her hair. I might tell a man he had a nice necktie on that day. That's all it amounted to, as far as I was concerned." *Id.* at 295. One wonders, however, how a heterosexual man would react if his gay supervisor were to stroke his tie while telling him how nice he looked that day.

143. *Id.* at 293.

144. *See* George, *supra* note 63, at 21.

145. *See* note 128 *supra.*

146. The analogy to mixed-motive cases is strong. If a racial or sexual stereotype enters into a promotion or hiring decision, even if the defendant based its decision not to hire or promote the plaintiff on a nondiscriminatory reason, the defendant is still liable under Title VII. 42 U.S.C. § 2000e-2(m) (Supp. V 1993). The defendant can only introduce evidence that shows that it would have reached the same employment decision absent discrimination to mitigate its damages. *Id.* § 2000e-5(g)(2)(B).

tion of the type Title VII, properly interpreted, forbids. Such discrimination need not be sexual to be actionable. The current focus on sexuality rather than gender-based discrimination has created a doctrine that does not protect women's full range of rights in the workplace. The doctrine should be revised to prohibit invidious disparate treatment based on gender regardless of whether such treatment is "sexual."